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89-1172

Supreme Court, U.S.
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No. 89-_____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

GOLDHOFER FAHRZEUGWERK GmbH & CO.,

Petitioner,

—v.—

THE UNITED STATES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Is the United States Customs Service required to supplement posted bulletin notice of liquidation with notice by mail to an importer-of-record who is entitled to notice by statute, and whose identity and address are easily ascertainable, to satisfy Fifth Amendment due process under the principles of *Mennonite Board of Missions v. Adams*, 462 U.S. 791 (1983).

2. Did the United States Court of Appeals for the Federal Circuit misconstrue this Court's holding in *Mennonite Board of Missions v. Adams*, 462 U.S. 791 (1983) as interpreted and applied by the Courts of Appeals for the First, Second, Third, and Sixth Circuits in various contexts by applying a balancing test in holding that Customs' posted bulletin liquidation notice at the Customhouse alone without mailing notice to the importer of record satisfied Fifth Amendment due process.

3. Did Customs' departure from its established administrative practice of supplementing constructive bulletin notice of liquidation with mailed notice to an importer deprive said importer of due process of law upon equal protection principles.

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IN THE

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OCTOBER TERM, 1989

No. 89-____

GOLDHOFER FAHRZEUGWERK GmbH & CO.,

Petitioner,[1]

—v.—

THE UNITED STATES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

To the Honorable Chief Justice and the Associate Justices of the Supreme Court:

The petitioner seeks a writ of certiorari to review a judgment of the United States Court of Appeals for the Federal Circuit entered on September 19, 1989, rehearing denied by order entered October 20, 1989, affirming a decision and judgment of the United States Court of International Trade granting summary judgment in favor of the respondent United States and dismissing the action.

OPINIONS BELOW

The decision and judgment of the United States Court of Appeals for the Federal Circuit in *Goldhofer Fahrzeugwerk*

1 Plaintiff-appellant below. There are no corporate relationships to be identified pursuant to Rule 28.1.

GmbH & Co., ____ Fed. Cir. (T) ____, 885 F.2d 858 (Fed. Cir. 1989) is reproduced in the Appendix at A1. The decision and judgment of the United States Court of International Trade affirmed by the Federal Circuit, *Goldhofer Fahrzeugwerk GmbH & Co. v. United States*, 13 CIT ____, 706 F.Supp. 892 (1989) is reproduced in the Appendix at A14.

JURISDICTION

The Court has jurisdiction to review this case by writ of *certiorari* pursuant to 28 U.S.C. section 1254(1). The judgment of the Federal Circuit was entered on September 19, 1989, and a timely petition for rehearing was denied by order entered October 20, 1989. (A12.) The Federal Circuit's jurisdiction was predicated upon 28 U.S.C. section 1295(a)(5), while that of the United States Court of International Trade was claimed under 28 U.S.C. section 1581(a).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 500 of the Tariff Act of 1930, as amended, 19 U.S.C. section 1500:

The appropriate customs officer shall, under rules and regulations prescribed by the Secretary—

> (a) appraise merchandise by ascertaining or estimating the value thereof, under section 1401a of this title, by all reasonable ways and means in his power, any statement of cost or costs of production in any invoice, affidavit, declaration, other document to the contrary notwithstanding;
>
> (b) ascertain the classification and rate of duty applicable to such merchandise;
>
> (c) fix the amount of duty to be paid on such merchandise and determine any increased or additional duties due or any excess of duties deposited;
>
> (d) liquidate the entry of such merchandise; and

(e) give notice of such liquidation to the importer, his consignee, or agent in such form and manner as the Secretary shall prescribe in such regulations.

Section 514 of the Tariff Act of 1930, as amended, 19 U.S.C. section 1514:

(a) Finality of decisions; return of papers

Except as provided in subsection (b) of this section, . . . decisions of the appropriate customs officer, including the legality of all orders and findings entering into the same, as to—

* * *

(2) the classification and rate and amount of duties chargeable;

* * *

shall be final and conclusive upon all persons (including the United States and any officer thereof) unless a protest is filed in accordance with this section, or unless a civil action contesting the denial of a protest, in whole or in part, is commenced in the United States Court of International Trade in accordance with Chapter 169 of Title 28 within the time prescribed by section 2636 of that title.

* * *

(c) Form, number, and amendment of protest; filing of protest

(1) * * * . . . [P]rotests may be filed with respect to merchandise which is the subject of a decision specified in subsection (a) of this section by—

(A) the importers or consignees shown on the entry papers, or their sureties;

(B) any person paying any charge or exaction;

(C) any person seeking entry or delivery;

(D) any person filing a claim for drawback; or

(E) any authorized agent of any of the persons described in clauses (A) through (D).

(2) A protest of a decision, order, or finding described in subsection (a) of this section shall be filed with such customs officer within 90 days after but not before—

(A) notice of liquidation or reliquidation . . . .

Section 159.9 of the Customs Regulations, 19 C.F.R. section 159.9:

Notice of liquidation and date of liquidation for formal entries.

(a) *Bulletin notice of liquidation.* Notice of liquidation of formal entries shall be made on a bulletin notice of liquidation, Customs Form 4333 or 4335:

(1) *Customs Form 4333.* Customs 4333 shall be used for the following types of entries:

(i) Dutiable consumption entries;

* * *

(b) *Posting of bulletin notice.* The bulletin notice of liquidation shall be posted for the information of importers in a conspicuous place in the customhouse at the port of entry (or Customs station, when the entries listed were filed at a Customs station outside of the limits of a port of entry), or shall be lodged at some other suitable place in the customhouse in such a manner that it can readily be located and consulted by all interested persons, who shall be directed to that place by a notice maintained in a conspicuous place in the customhouse stating where notices of liquidation of entries are to be found.

(c) *Date of liquidation*—(1) *Generally.* The bulletin notice of liquidation shall be dated with the date it is posted or lodged in the customhouse for the information of importers. The entries for which the bulletin notice of liquidation has been prepared shall be stamped "Liquidated," with the date of liquidation, which shall be the same as the date of the bulletin notice of

liquidation. This stamping shall be deemed the legal evidence of liquidation.

* * *

(d) *Courtesy notice of liquidation.* Customs will endeavor to provide importers or their agents with Customs Form 4333-A, "Courtesy Notice", for entries specified in § 159.9(a)(1), scheduled to be liquidated or deemed liquidated by operation of law. This notice shall serve as an informal, courtesy notice and not as a direct, formal, and decisive notice of liquidation.

STATEMENT OF THE CASE

The petitioner was the importer-of-record of a multiaxle vehicle entered at the port of Norfolk, Virginia under a tariff provision for semitrailers dutiable at 4% *ad valorem*.[2] Customs classified the merchandise and assessed duty under a provision for full trailers at 8% *ad valorem*, and liquidated the entry accordingly on June 5, 1981.[3] By statute, Customs is required to furnish the importer with notice of liquidation. 19 U.S.C. section 1500(e). Under its regulation, Customs posts a bulletin notice of liquidation at the Customhouse, and "will endeavor" to furnish the importer with a so-called courtesy liquidation notice which, as a matter of established practice, is mailed to the importer at the address indicated on the entry documents. To contest a duty assessment, the importer or other interested party with standing must file an administrative protest within 90 days of notice of liquidation but not before. 19 U.S.C. section 1514. Since the United States Court of International Trade (CIT) has exclusive original jurisdiction over causes of action challenging duty assessments, and such actions must be commenced within 180 days after the mailing of a notice of denial of a protest, a timely protest is a jurisdictional condition prece-

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2 Entry refers to the filing of documents, or to the documents themselves, required for Customs to determine the admissibility of and duty assessment on imported merchandise. See 19 U.S.C. § 1484; 19 C.F.R. Part 141.

3 Liquidation means the final computation or ascertainment of the duties or drawback accruing on an entry. 19 C.F.R. § 159.1.

dent to an action in the CIT. 28 U.S.C. sections 1581(a), 2636(a). Therefore, insufficient notice of liquidation may deprive an importer of his right to contest a duty assessment in court.

Due to a computer error, Customs' bulletin liquidation notice and the courtesy notice for the involved entry identified the wrong importer. Customs personnel at Norfolk discovered and manually corrected the error on the bulletin notice before posting it on or about the date of liquidation. However, due to the error, the courtesy notice was mailed to the wrong party. Customs never mailed the petitioner importer-of-record a liquidation notice. On the 91st day from liquidation, Customs sent the petitioner a bill for the duty increase which was received and paid. The petitioner filed an administrative protest within 90 days from the date of Customs' duty bill, but beyond 90 days from the date of the bulletin liquidation notice. Customs denied the protest as untimely, and the petitioner commenced an action in the CIT.

The petitioner's United States distributor prevailed in a CIT test case challenging the tariff classification of an entry of merchandise the same in all material respects as that which was the subject of the entry in question. *Goldhofer Trailers (USA), Inc. v. United States*, 7 CIT 141 (1984). The decision was never appealed and became final.

The CIT granted the government's motion for summary judgment in this case based on a lack of jurisdiction due to the purportedly untimely protest. The court held, *inter alia*, that the bulletin notice posted at the customhouse is the only notice that Customs is required to furnish, and that importers are obliged to peruse the posted bulletin notices to preserve their right to protest. The petitioner argued that fifth amendment due process required Customs to supplement the constructive bulletin notice with notice by mail under the principles of *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306 (1950) and its progeny including *Mennonite Board of Missions v. Adams*, 462 U.S. 791 (1983). Nevertheless, the CIT held that the bulletin notice alone was "reasonable." The Federal Circuit

affirmed applying a balancing or weighing of the circumstances test, and distinguished *Mullane*, *supra*, and *Mennonite Board of Missions*, *supra*, in holding that posting the bulletin liquidation notice in the customhouse was as certain to ensure actual notice of liquidation as mailed notice, and therefore, that mailed notice was not constitutionally required.

The petitioner filed a timely motion for rehearing and suggestion for rehearing in banc in which it stated that the rule in *Mennonite Board of Missions* is that when a party-in-interest's name and address are reasonably ascertainable, any form of constructive notice must be supplemented by mailed notice, or other means as certain to ensure actual notice, to meet minimum due process requirements. Further, the petitioner pointed out that the majority in *Mennonite Board of Missions* did not apply a balancing test, a factor highlighted by the dissenting opinion in that case. Moreover, each circuit that has considered a constructive notice due process issue since *Mennonite Board of Missions* has applied its rule categorically regardless of the context. None has applied a balancing test. Finally, the petitioner argued that Customs' failure to follow its administrative practice of mailing liquidation notice deprived the petitioner of due process based on equal protection principles as applied in, for example, *Eisen v. Carlisle and Jacquelin*, 417 U.S. 156 (1974). The Federal Circuit denied the rehearing petition (A12) and declined to rehear in banc although two circuit judges would have reheard the case in banc. (A13)

REASONS FOR GRANTING THE WRIT

The Court Should View a Federal Appellate Decision That Constructive Notice Alone To An Identifiable Party Satisfies Fifth Amendment Due Process As Squarely In Conflict With Decisions of This Court as Construed and Applied By Other Circuit Courts of Appeals on Substantially the Same Issue.

In the seminal decision concerning the constitutional adequacy of constructive notice, this Court stated, "[w]here the names and post office addresses of those affected by a proceed-

ing are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency." *Mullane*, *supra*, at 318. In *Mullane*, the Court employed a weighing analysis or test which has been utilized by the Court in subsequent decisions. However, this analysis was abandoned in the pivotal *Mennonite Board of Missions*, *supra*, in which the Court stated:

> Notice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of *any* party, whether unlettered or well versed in commercial practice, if its name and address are reasonably ascertainable. Furthermore, a mortgagee's knowledge of delinquency in the payment of taxes is not equivalent to notice that a tax sale is pending. The latter "was the information which the [county] was constitutionally obliged . . . to give personally to the appellant—an obligation which the mailing of a single letter would have discharged." *Schroeder v. New York City*, 371 U.S., at 214.

462 U.S. 800. In its opinion, the Court observed:

> Personal service or mailed notice is required even though sophisticated creditors have means at their disposal to discover whether property taxes have not been paid and whether tax—sale proceedings are therefore likely to be initiated. * * * More importantly, a party's ability to take steps to safeguard its interests does not relieve the State of its constitutional obligation.

462 U.S. 799. In a nine-page dissenting opinion, the minority applied a balancing or weighing test and repeatedly recognized that the majority "decision today is squarely at odds with the balancing approach that we have developed." *Id.* at 800-809. The Court upheld and expanded the rule in *Mennonite Board of Missions* in the more recently decided *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478 (1988).

Each circuit court which has considered the sufficiency of a form of constructive notice has applied the rule in *Mennonite*

Board of Missions without deviation. *United States v. 125.2 Acres of Land*, 732 F.2d 239 (1st Cir. 1984); *Bender v. City of Rochester*, 765 F.2d 7 (2d Cir. 1985) ("Plainly the dissenters in *Mennonite* understood this language to announce a significant change from the standard of prior decisions. * * * What the Court has done is shift the inquiry from whether under all the circumstances the notice was reasonably calculated to inform those with protectable interests to a more focused examination of whether the names of such persons are 'reasonably ascertainable,' in which event mail or equivalent notice is required." 765 F.2d 10-11); *Sterling v. Environmental Control Board of the City of New York*, 793 F.2d 52 (2d Cir. 1986) ("Appellees argue that appellants could have insured their receipt of summonses merely by placing and monitoring an 'owner's mailbox' at each of their buildings. However, the Supreme Court has made clear that 'a party's ability to take steps to safeguard its interests does not relieve the State of its constitutional obligation.' " 393 F.2d 56); *Benoit v. Panthaky*, 780 F.2d 336 (3d Cir. 1985) ("Since Benoit was the identifiable owner of the property and his address could have been ascertained by reasonably diligent efforts, personal or mailed notice of the sale was constitutionally required." 785 F.2d 338); *Verba v. Ohio Cas. Ins. Co.*, 851 F.2d 811 (6th Cir. 1988) ("As in *Mennonite*, personal service or mailed notice is constitutionally required to be provided to a specific judgment lienholder whose identity and address are a matter of public record." 851 F.2d 816). Thus, the Federal Circuit's application of a weighing and balancing test to determine the constitutional sufficiency of constructive notice alone is squarely at odds with the majority opinion in *Mennonite Board of Missions* as reaffirmed in *Tulsa Professional Collection Services, Inc.*, *supra*, and as applied by the First, Second, Third, and Sixth Circuits. Accordingly, the Court should grant this petition to review a decision contrary to Supreme Court precedent and in conflict with the decisions of each other circuit court that has considered the issue. The petitioner submits that it was deprived of property without due process of law by Customs' failure to supplement constructive bulletin notice of liquidation with notice by mail.

CONCLUSION

For the foregoing special and important reasons, the petitioner submits that the Court should entertain argument, or order a summary disposition on the merits, concerning application of the rule in *Mennonite Board of Missions v. Adams*, *supra*, as to whether a balancing and weighing test is permissible, and to resolve a conflict between the circuits on this issue.

Respectfully submitted,

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January 16, 1990

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

89-1298

GOLDHOFER FAHRZEUGWERK GmbH & CO.,

Plaintiff-Appellant,

v.

THE UNITED STATES,

Defendant-Appellee.

James A. Geraghty, Donohue & Donohue, of New York, New York, argued for plaintiff-appellant.

Mark S. Sochaczewsky, Commercial Litigation Branch, Department of Justice, of New York, New York, argued for defendant-appellee. With him on the brief were *Stuart E. Schiffer*, Acting Assistant Attorney General, *David M. Cohen*, Director and *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office.

Appealed from: U.S. Court of International Trade
Judge Tsoucalas

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

89-1298

GOLDHOFER FAHRZEUGWERK GmbH & CO.,

Plaintiff-Appellant,

v.

THE UNITED STATES,

Defendant-Appellee.

DECIDED: September 19, 1989

Before ARCHER, *Circuit Judge*, COWEN, *Senior Circuit Judge*, and MICHEL, *Circuit Judge*.

MICHEL, *Circuit Judge*.

In this customs duty case, the United States Court of International Trade granted summary judgment in favor of the United States, holding that, as a matter of law, Goldhofer Fahrzeugwerk GmbH & Co.'s (Goldhofer) protest of liquidation was not timely filed with the United States Customs Service (Customs) within the 90-day protest period set forth by 19 U.S.C. § 1514(c)(2) (1982). *Goldhofer Fahrzeugwerk GmbH & Co. v. United States*, 706 F. Supp. 892 (Ct. Int'l Trade 1989). In reaching that disposition, the Court of International Trade concluded that posting "bulletin notice" of liquidation alone both complies with the applicable customs laws and regulations and satisfies the minimum constitutional standards for due process. We affirm.

Issues

Two principal issues are presented on appeal: First, whether the Court of International Trade erred by holding that posting

bulletin notice of liquidation alone fully complies with the requirements of the applicable Customs statute and regulations; and, second, whether the Court of International Trade erred by concluding that Customs' failure to send "courtesy notice" by mail to Goldhofer did not abridge constitutional requirements for due process.

Background

Goldhofer, a corporation organized under the laws of the Federal Republic of Germany, has its principal place of business in Memmingen, West Germany. Goldhofer was the importer of record of a certain multiaxle "gooseneck" semitrailer covered by Entry No. 101757 of February 16, 1980, at the port of Norfolk, Virginia.

A transcription error by Customs employees caused the name and address of Walsen Design and Manufacturing, an unrelated third party and stranger to the transaction, to be entered into Customs' data base in connection with the involved entry. Consequently, when the June 5, 1981, bulletin notice of liquidation was prepared for the port of Norfolk, Virginia, the importer of record for Entry No. 101757 was listed as Walsen Design and Manufacturing. Customs printed out the courtesy notice of liquidation and the bill for the duty increase. The bill and notice were mailed to the party indicated thereon, Walsen Design and Manufacturing. Goldhofer never received a courtesy notice or original bill.

In the Norfolk Customs Entry Control Section, the transcription error was discovered and a clerk manually annotated the bulletin notice to substitute the name of Goldhofer and its address in Memmingen, West Germany. On or about June 5, 1981, the bulletin notice of liquidation as annotated was posted at the Entry Control Section of the Norfolk Customhouse. No Customs official or employee took steps to correct the data base after the above described discrepancy was discovered and no Customs official or employee made any effort to furnish Goldhofer with courtesy notice.

Subsequently, Customs generated a "REBILL" dated September 4, 1981 (the 91st day after the June 5, 1981, liquidation) addressed to Goldhofer in Memmingen, West Germany. On December 1, 1981, Goldhofer filed a protest at the port of Norfolk, Virginia, covering the involved entry. That protest was received by Customs 179 days after the June 5, 1981, bulletin notice was posted, but on the 88th day after September 4, 1981, the date of the REBILL. Customs denied Goldhofer's protest as untimely because it was not filed within the 90-day protest period set forth by statute. 19 U.S.C. § 1514(c)(2) (1982).

Goldhofer, pursuant to 28 U.S.C. § 1581(a) (1982), brought action in the Court of International Trade contesting the denial of its protest. Before that court, Goldhofer argued that Customs' failure to provide courtesy notice of liquidation both violated Customs' own regulations and failed to meet the minimum constitutional requirements for due process. On that basis, Goldhofer contended that the June 5, 1981, liquidation was incomplete and that Goldhofer's December 1, 1981, protest was timely because it was filed within 90 days after Goldhofer received Customs' September 4, 1981, REBILL. The United States responded and both parties filed cross motions for summary judgment.

On January 18, 1989, the Court of International Trade granted summary judgment to the United States, concluding that Goldhofer's protest of the June 5, 1981, liquidation was untimely. Goldhofer's motion for summary judgment was denied. For the reasons set forth below, we hold that the Court of International Trade committed no legal error in reaching this disposition.

Analysis

A. Customs' statute and regulations were satisfied.

Goldhofer argues that Customs failed both to comply with its own regulations and to follow its long established administrative practice by not "endeavor[ing]" to provide courtesy notice. These failures, Goldhofer contends, rendered liquidation

incomplete and tolled the time within which the importer was required to file a protest. We are not persuaded.

Section 1500 of Title 19 of the United States Code (1982) provides the following:

> § 1500. Appraisement, classification, and liquidation procedure
>
> The appropriate customs officer shall, under rules and regulations prescribed by the Secretary—
>
> * * * *
>
> (e) give notice of such liquidation to the importer, his consignee, or agent in such form and manner as the Secretary shall prescribe in such regulations.

Pursuant to this statute, the Secretary promulgated the following regulation:

> § 159.9 Notice of liquidation and date of liquidation for formal entries.
>
> (a) *Bulletin notice of liquidation.* Notice of liquidation of formal entries shall be made on a bulletin notice of liquidation, Customs Form 4333 or 4335 * * *.
>
> (b) *Posting of bulletin notice.* The bulletin notice of liquidation shall be posted for the information of importers in a conspicuous place in the customhouse at the port of entry * * *, or shall be lodged at some other suitable place in the customhouse in such a manner that it can readily be located and consulted by all interested persons, who shall be directed to that place by a notice maintained in a conspicuous place in the customhouse stating where notices of liquidation of entries are to be found.
>
> * * * *
>
> (d) *Courtesy notice of liquidation.* Customs will endeavor to provide importers or their agents with Customs Form 4333-A, "Courtesy Notice", for entries specified in § 159.9(a)(1), scheduled to be liquidated or deemed liquidated by operation of law. This notice shall serve as

an informal, courtesy notice and not as a direct, formal, and decisive notice of liquidation.

The plain language of the implementing regulations is clear that the only notice of liquidation required is bulletin notice "posted for the information of importers in a conspicuous place in the customhouse at the port of entry." 19 C.F.R. § 159.9(b) (1988). Courtesy notice is just that, a "courtesy," and Customs' providing, or failure to provide, such a notice cannot create any legally cognizable right in the importer. *See United States v. Reliable Chemical Co.*, 605 F.2d 1179, 1184 (CCPA 1979) ("Early notice of liquidation, forwarded as a 'courtesy' by the Government, is not and cannot be converted into the statutory notice at the election of an importer.").

B. The Due Process requirements of the Constitution were satisfied.

In addition, Goldhofer argues that Customs' failure to provide courtesy notice abridged the minimum due process requirements of the Constitution. Goldhofer contends that, under those minimum requirements as articulated by the United States Supreme Court in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), *Greene v. Lindsey*, 456 U.S. 444 (1982), *Mennonite Board of Missions v. Adams*, 462 U.S. 791 (1983), and *Tulsa Professional Collection Services, Inc. v. Pope*, 108 S. Ct. 1340 (1988), Customs is required to provide Goldhofer mail notice of liquidation. We disagree.

"An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane*, 339 U.S. at 314. "Notice by mail or other means *as certain* to ensure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of *any* party, whether unlettered or well versed in commercial practice, if its name and address are reasonably ascertainable." *Mennonite Board of Missions*, 462 U.S. at 800

(emphasis supplied) (quoted in *Tulsa Professional Collection Services, Inc.*, 108 S. Ct. at 1344). Clearly, Customs' liquidation of, and assessment of duties on, Goldhofer's goods are elements of a proceeding that may adversely affect Goldhofer's property interest in its goods. Because, as importer of record, Goldhofer's name and address are registered with Customs, Customs is constitutionally required to provide Goldhofer with notice "as certain to ensure actual notice" that liquidation has occurred, as would mail notice. *Id.* at 800.

In weighing the sufficiency of a form of notice on the basis of equivalence of likelihood of actual notice, the Supreme Court has looked to a number of considerations. First, and foremost, is whether the form of notice relies on chance alone to reach the attention of the interested party. *Mullane*, 339 U.S. at 315 (cited by *Mennonite*, 462 U.S. at 795-96). In addition, the Court has considered whether the form of notice is designed to attract the attention of the interested party. *Mennonite*, 462 U.S. at 799. Third is whether the actual means of providing notice is reliable. *Greene*, 456 U.S. at 453. Finally, "the reasonableness of the notice provided must be tested with reference to the existence of 'feasible and customary' alternatives and supplements to the form of notice chosen." *Id.* at 454 (quoting *Mullane*, 339 U.S. at 315).

Here, bulletin notice does not rely on chance alone to bring notice of liquidation to the attention of the importer. By voluntarily entering its goods into the Customs Territory of the United States, Goldhofer was statutorily notified that, as a matter of law, its goods would be liquidated. 19 U.S.C. § 1500(d) (1982) ("The appropriate customs officer shall * * * liquidate the entry of such merchandise * * * ."). Customs regulations, promulgated pursuant to statute, provide that notice of liquidation shall be posted at the customhouse at the port of entry of the goods. Therefore, Goldhofer, by choosing to enter its goods at a particular port of entry, knew that liquidation would occur there and selected that precise location to receive the notice of that liquidation. Although we recognize that the interested party's knowledge of an impending government proceeding does not relieve the government of its obligation to provide that party with adequate notice, *see Mennonite*, 462 U.S. at 800, the

existence, or lack thereof, of that knowledge may be considered in weighing the constitutional sufficiency of a form of notice on the basis of equivalent likelihood of actual notice.

In addition, bulletin notice is designed to attract the attention of the interested party. 19 C.F.R. § 159.9(b) (1988) ("The bulletin notice of liquidation shall be posted for the information of importers * * * ."). Among other things, bulletin notice lists the name of the importer of record, the date of entry, the liquidation date, the region/district/port number, the action, and the type of entry and number. In contrast, the form of notice used in *Tulsa*, *Mennonite*, and *Mullane* did not specifically name the party seeking notice. In those cases, the notice either generally referred to a class or group in which the party seeking notice fell, *see Tulsa*, 108 S. Ct. at 1342 (notice generally to the creditors of the deceased); *Mullane*, 339 U.S. at 309-10 (notice addressed generally without naming them to all parties interested in a common trust fund), or was designed primarily to reach an entirely different class or group. *See Mennonite*, 462 U.S. at 799 (notice primarily designed to attract prospective purchasers to a tax sale and could not be expected to lead to actual notice to the mortgagee). In addition, in those cases, notice generally was only periodically made available to the interested parties by infrequent publication in some unspecified local newspaper. *See Tulsa*, 108 S. Ct. at 1342 (executor or executrix must publish notice in some newspaper in the county once each week for two consecutive weeks); *Mennonite*, 462 U.S. at 793 (county auditor must post notice in the county courthouse and publish notice in a local newspaper once each week for three consecutive weeks); *Mullane*, 339 U.S. at 309-10 (petitioner shall publish notice not less than once in each week for four successive weeks in a newspaper to be designated by the court). Here, however, as discussed above, Customs continuously provided bulletin notice at the specific location, i.e., the customhouse at the port of entry of the goods, selected by Goldhofer when it entered its goods into the United States Customs Territory.

Moreover, bulletin notice posted in the customhouse has not been shown to be an unreliable means of providing notice. In *Greene*, the Supreme Court considered the constitutionality of

a form of notice in forcible entry or detainer proceedings consisting of posting a copy of the summons, stating the name of the interested party and the time and place of the meeting of the court, on the door of the apartment leased by the party seeking notice. *Greene*, 456 U.S. at 446. In that case, the form of notice both did not rely on chance alone to bring the notice to the attention of the interested party and was designed to attract the attention of that party. Nonetheless, the Court concluded that the method of notice failed to meet the constitutional minimums of due process because, in the circumstances of that case, the posted notices were "not infrequently" removed before they could have their intended effect. *Id.* at 453. Here, however, there is no evidence in the record, and it has not been proffered, that bulletin notices posted in the customhouse have been removed by anyone before they could have their intended effect of notifying the importer of record, and any other interested parties, that liquidation has occurred.

Finally, in determining whether reasonably feasible and customary alternatives and supplements to bulletin notice exist, we must look to the purpose and effect of the type of notice given. Here, bulletin notice of liquidation has both a legal effect and a warning effect. As to the former, mail notice is not a viable alternative or supplement because it is well established that, as a matter of law, the information contained on the bulletin notice controls issues relating to liquidation. *See, e.g.*, 19 C.F.R. § 159.9(c)(2)(iii) (1988) (providing that a protest relating to a liquidation "shall be filed within 90 days from the date the bulletin notice of liquidation * * * is posted or lodged in the customhouse"); *Reliable Chemical Co.*, 605 F.2d at 1183 (recognizing that, as a matter of law, "the date of liquidation shall be the date the bulletin notice is posted in the customhouse"). As to the latter, we cannot disagree that mail notice can always supplement any type or form of notice. However, the Supreme Court has not held that mail notice must be an integral step in *every* notice scheme and neither shall we. In the circumstances of this case, posting of bulletin notice of liquidation in the customhouse at the port of entry alone was as certain to ensure actual notice of liquidation to the importer of record

or its local Customs broker as mail notice and, therefore, mail notice was not constitutionally required.

Conclusion

In view of the foregoing, the decision of the Court of International Trade is

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

89-1298

GOLDHOFER FAHRZEUGWERK GmbH & CO.,

Plaintiff-Appellant,

v.

THE UNITED STATES,

Defendant-Appellee.

JUDGMENT

ON APPEAL from the U.S. Court of International Trade

in CASE NO(S). 82-4-00551

This CAUSE having been heard and considered, it is

ORDERED and ADJUDGED:

AFFIRMED.

ENTERED BY ORDER OF THE COURT

DATED SEP 19 1989 /s/ FRANCIS X. GINDHART
Francis X. Gindhart, Clerk

ISSUED AS A MANDATE: OCTOBER 27, 1989
COSTS: AGAINST APPELLANT
PRINTING . .$122.80
TOTAL. $122.80

ORDER

Before ARCHER, Circuit Judge, COWEN, Senior Circuit Judge, and MICHEL, Circuit Judge.

A petition for rehearing having been filed in this case,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, denied.

The suggestion for rehearing in banc is under consideration.

The mandate will issue on October 27, 1989.

FOR THE COURT,

/s/ FRANCIS X. GINDHART
Francis X. Gindhart
Clerk

Dated: October 20, 1989

cc: JAMES A. GERAGHTY
MARK S. SOCHACZEWSKY

GOLDHOFER V US, 89-1298

Note: This order has not been prepared for publication in a reporter.

ORDER

A suggestion for rehearing in banc having been filed in this case, and a response thereto having been invited by the court and filed,

UPON CONSIDERATION THEREOF, it is

ORDERED that the suggestion for rehearing in banc be, and the same hereby is, declined.

Circuit Judge Nies and Circuit Judge Bissell would rehear the case in banc.

FOR THE COURT

/s/ FRANCIS X. GINDHART
Francis X. Gindhart

Dated: December 1, 1989

cc: James A. Geraghty
Mark S. Sochaczewsky

GOLDHOFER V US, 89-1298

Note: This order has not been prepared for publication in a reporter.

UNITED STATES COURT OF INTERNATIONAL TRADE

Court No. 72-4-00551

SLIP OP. 89- 7

BEFORE: JUDGE NICHOLAS TSOUCALAS

GOLDHOFER FAHRZEUGWERK GMBH & CO.,

Plaintiff,

v.

UNITED STATES,

Defendant.

[Plaintiff's motion for summary judgment denied; defendant's cross-motion for summary judgment granted; action is dismissed.]

Decided: January 18, 1989

Donohue and Donohue (*James A. Geraghty*) for plaintiff.

John R. Bolton, Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Mark S. Sochaczewsky*) for defendant.

OPINION

TSOUCALAS, Judge: Goldhofer Fahrzeugwerk GMBH & Co., plaintiff, brings this action to contest the denial of its protest pursuant to 28 U.S.C. § 1581(a). The parties cross-move for summary judgment. Plaintiff claims inadequate bulletin notice of liquidation concerning its importation of a multiaxle "gooseneck" semitrailer, entry no. 101757, on February 16, 1980, at the port of Norfolk, Virginia. Plaintiff argues in the alternative that even if the bulletin notice was adequate, such notice is insufficient to meet the minimum constitutional due process requirements. The government insists that the bulletin notice was adequate and that the Court lacks jurisdiction because plaintiff failed to file its protest within the ninety-day protest period. 19 U.S.C. § 1514(c)(2). The government also contends that constructive notice is a constitutionally sufficient means to apprise importers of liquidation.

Background

A transcription error by the United States Customs Service (Customs) generated a name other than plaintiff's on the computer printout sheet which served as bulletin notice of liquidation, posted in the customhouse pursuant to 19 C.F.R. § 159.9(b),[1] on June 5, 1981. Prior to posting the notice, a clerk manually corrected the error, writing in the name and address of plaintiff, "Goldhofer Fahrzeugwerk GMBH & Co.," between columns of data in three segments, spelled "Goldhofer" in one part, "Zahreug" in another and "werk" in yet a

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1 19 C.F.R. § 159.9(b) states:

Posting of bulletin notice. The bulletin notice of liquidation shall be posted for the information of importers in a conspicuous place in the customhouse at the port of entry (or Customs station, when the entries listed were filed at a Customs station outside the limits of a port of entry), or shall be lodged at some other suitable place in the customhouse in such a manner that it can readily be located and consulted by all interested persons, who shall be directed to that place by a notice maintained in a conspicuous place in the customhouse stating where notices of liquidation of entries are to be found.

third part of the line; the address was written at the bottom of the printout sheet. *See Post-Argument Brief for the United States, Defendant* at Exhibit 3. Additionally, plaintiff never received courtesy notice of liquidation[2] because the error had caused the courtesy notice to be sent to the party originally listed on the printout sheet. Plaintiff protested the liquidation on December 1, 1981, one hundred seventy-nine days after bulletin notice, but within ninety days of the date of "REBILL C.F. 6084," which plaintiff claims is the proper notice date. *See Plaintiff's Brief in Support of Motion for Summary Judgment* at *Statement of Material Facts* #12 [hereinafter *Plaintiff's Brief*]. The protest was denied as untimely filed.

The issues are: (1) whether the above described listing of plaintiff's name constituted proper notice as required by section 500(e) of the Tariff Act of 1930, *as amended*, 19 U.S.C. § 1500(e);[3] and (2) whether the failure to provide courtesy notice, regardless of bulletin notice, is a constitutional deprivation of due process.

Discussion

Notice of liquidation is intended to apprise importers of an action taken which may affect their interests, and to afford them an opportunity to invoke "the provisions of law by which administrative and judicial review of the [Customs] action may be secured." *Lansdowne Distillery v. United States*, 39 Cust. Ct. 190, 194, C.D. 1925 (1957) (quoting *Wong Sang Man v. United States*, 27 Cust. Ct. 248, 250, C.D. 1379 (1951)). With-

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2 Under the regulation, Customs "will endeavor to provide importers or their agents with Customs Form 4333-A, 'Courtesy Notice', for entries . . . scheduled to be liquidated. . . . This notice shall serve as an informal, courtesy notice and not as a direct, formal, and decisive notice of liquidation." 19 C.F.R. § 159.9(d).

3 19 U.S.C. § 1500(e) states the following:

> The appropriate customs officer shall, under rules and regulations prescribed by the Secretary—
>
> (e) give notice of such liquidation to the importer, his consignee, or agent in such form and manner as the Secretary shall prescribe in such regulations.

out proper notice, liquidation is incomplete and the statute of limitations for filing a protest will be tolled until the parties are adequately notified. *Id.* at 194.

Plaintiff argues that the manual correction did not provide the notice required by law because Customs had an established administrative practice of preparing such notices by automated data processing. According to plaintiff, the manual notation was absolutely useless and the deficiency could not be cured until the data base was corrected and a new CF 4333[4] was generated and posted, or until it was supplemented by actual notice by mail. *Plaintiff's Brief* at 6.

Contrary to plaintiff's position, however, proper liquidation notice requires only that an importer's name be posted and displayed "in a conspicuous place in the customhouse at the port of entry . . . ." 19 C.F.R. § 159.9(b). There is no requirement that notice must be in the form of a computer printout. Notice is legally sufficient if "the importer could [not] have reasonably been misled or confused by the bulletin notice of liquidation, as posted . . . ." *United States v. Judson Sheldon Div., Nat'l Carloading Corp.*, 42 CCPA 202, 203-04, C.A.D. 594 (1955). The Court cannot envision how plaintiff could have been misled by this notice. The name of plaintiff, albeit, handwritten in between columns of data, was legible and readily discernible. It is clear that plaintiff's name was intended to replace the crossed out name. Furthermore, plaintiff's name appears in its proper alphabetical sequence, next to the correct entry number as well as the correct date of entry. *See Steinhardter & Nordlinger v. United States*, T.D. 43764, 56 Treas. Dec. 697, 699 (1929). A prudent importer would have concluded that it was his entry which was posted. At the least, plaintiff should have inquired into the nature of the correction. *See Judson Sheldon*, 42 CCPA at 206.

Plaintiff asks the Court to follow *United States v. Astra Bentwood Furniture Co.*, 28 CCPA 205, 207, C.A.D. 147 (1940), where the court found liquidation to be incomplete when the notice identified the importer as "Astringent Wood

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4 Notice of liquidation of formal entries is made on Customs Form 4333 (CF 4333) which is the bulletin notice of liquidation under 19 C.F.R. § 159.9(a).

Furniture Co." rather than as "Astra Bentwood Furniture Co." The court found that, in effect, no notice was given because the notice did not correctly state the date or name of the importer. However, *Astra* is distinguishable on its facts because the corrected entry here accurately provided the name of the importer, whereas in *Astra*, the name provided was different from that of the importer.[5] Each case is to be determined by its own particular facts. *Id.* at 212.

Plaintiff additionally maintains that it should prevail regardless of the adequacy of the manually corrected bulletin notice, because it never received the customary courtesy notice through the mail. Plaintiff suggests that such notice has become mandatory, referring to a Customs Court case which held that:

> [w]here an administrative agency over a long period of time establishes a practice of informing persons who have business before the agency of their obligations to the agency, such persons are entitled to assume that the estab-

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5 Additionally, even though the name appears to have been misspelled, the name is written as it appears on certain customs entry papers filled out by plaintiff and does not, therefore, prejudice plaintiff. *See Post-Argument Brief for the United States, Defendant at* Exhibits 1, 2. In *Howard Rapaport v. United States*, 4 CIT 215, 216-17 (1982), the plaintiff claimed prejudicial error when Customs listed the importer's name as "In-Novo Co." rather than its full name, "In-Novo Engineering and Development Company," and listed the date of entry as "07-22-08" rather than "07-22-80." The court, however, found that "[n]either of these clerical errors [was] of sufficient importance to void this liquidation." *Id.* at 216. The decision was, no doubt, influenced by plaintiff's protest being filed "in the name of 'In-Novo Co.' as [well as] other correspondence sent to Customs and attached to the moving papers." *Id.* at 217.

Likewise, the omission of "GMBH & Co." is not fatal to adequate notice. *E.g.*, *Steinhardter*, 56 Treas. Dec. at 698-99 (abbreviated name from "Steinhardter & Nordlinger" to "Steinhard & Nord" held to be valid notice because it was only "somewhat abbreviated" and sufficient to notify the parties of the liquidation); *see also Cavalier Shipping Co. v. United States*, 39 Cust. Ct. 219, 224, C.D. 1932 (1957) (abbreviation of the importer's full name not misleading or confusing since it was indubitably clear that the reference was to the importer); *but see M. Dublin v. United States*, 2 Cust. Ct. 14, 17, C.D. 77 (1939) (notice was not legally sufficient where the entry was posted as " 'W.J. Byr' something, either nes or nns or nos" and the broker's name was "W.J. Byrnes & Co. of New York, Inc.").

> lished practice will be followed, in the absence of notice that it has been discontinued.

Lansdowne Distillery, 39 Cust. Ct. at 195. In *Lansdowne*, the importer was not given access to entry papers which contained the facts upon which the collector based his action. *Id.* at 193. Plaintiff "could not examine [the papers] to determine whether or not it desired to avail itself of the right to protest . . . ." *Id.* The failure to carry out this administrative practice prevented plaintiff from pursuing his claim whereas in the instant action, plaintiff was not deprived of any such right.

Plaintiff was not justified in relying solely upon the courtesy notice in light of strict language used in the regulations detailing the informality of courtesy notice and in light of applicable case law. The only notice that is statutorily mandated is bulletin notice "in a conspicuous place in the customhouse at the port of entry . . . ." 19 C.F.R. § 159.9(b). Courtesy notice is not the notice established by Customs in 19 C.F.R. § 159.9. *United States v. Reliable Chemical Co.*, 605 F.2d 1179, 1182, 66 CCPA 123, 126, C.A.D. 1232 (1979). As affirmatively stated in *Reliable Chemical*, the importer knows or should know that "the date of liquidation shall be the date the bulletin notice is posted in the customhouse," *Reliable Chemical*, 605 F.2d at 1183, 66 CCPA at 127, not the date it receives courtesy notice.[6]

The need to monitor the bulletin posting has been repeatedly emphasized. "[I]t is the plain duty of a prudent importer . . . to examine all notices posted in order to determine whether or not liquidation has been made on entries with which said importer is concerned." *Henry A. Wess, Inc. v. United States*, 57 Cust. Ct. 139, 143, C.D. 2743 (1966), *aff'd*, 54 CCPA 77, C.A.D. 910 (1967). The agency has no duty "to enlarge or broaden the mandatory requirement of the law," 54 CCPA at 80, merely because the importer has become accustomed to an extended courtesy. "The importer has the burden to check for

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6 Plaintiff relies heavily in its brief on the decision of this Court in *State Metals, Inc. v. United States*, 82 Cust Ct. 91, C.D. 4793 (1979), *vacated as moot*, 84 Cust. Ct. 51, C.D. 4840 (1980). However, the case was decided prior to the appellate court's decision in *Reliable Chemical*, and has since been vacated as moot; therefore, it has limited precedential value.

posted notices of liquidation and to protest timely." *Omni U.S.A., Inc. v. United States*, 11 CIT ____, ____, 663 F. Supp. 1130, 1133 (1987), *aff'd*, No. 87 1602 (Fed. Cir. Mar. 2, 1988), *cert. denied*, S7 U.S.L.W. 3230 (U.S. Oct. 3, 1988). Hence, plaintiff importer should have known of the requirement of posting bulletin notice, had a duty to monitor the customhouse bulletin and should not expect its rights to be expanded upon the nonreceipt of courtesy notice.

The position that courtesy notice is only a "courtesy" is buttressed by the legislative history of the statute which indicates that while Congress intended that courtesy notice be sent, Congress did not anticipate that it be the primary or the required manner of alerting importers to liquidations. At the House hearings prior to the 1970 amendments to the Tariff Act of 1930, the Treasury Department assured that the "practice of mailing actual notice of liquidation of all dutiable formal entries to the last known address of the importer of record" would be continued. H.R. Rep. No. 271, 91st Cong., 2d Sess. *reprinted in* 1970 U.S. Code Cong. & Admin. News 3188, 3210. Congress, however, did not intend courtesy notice to supplant the practice of monitoring the customhouse bulletin for posted notices.

> While courtesy notices of the liquidation of certain entries *may* be sent to importers or their agents . . . an importer . . . must check the bulletin notices regularly to ascertain whether entries have been liquidated and the dates of such liquidation if a refund is due . . . .

H.R. Rep. No. 1015, 98th Cong., 2d Sess. 67-68, *reprinted in* 1984 U.S. Code Cong. & Admin. News 4960, 5026-5027 (emphasis added).

Plaintiff further argues that notice by publication alone does not meet minimum due process requirements prescribed under the United States Constitution. In support of this proposition, plaintiff relies on *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791 (1983), and *Greene v. Lindsey*, 456 U.S. 444 (1982). The Court in *Mennonite* held that "[n]otice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect

the liberty or property interests of *any* party, whether unlettered or well versed in commercial practice, if its name and address are reasonably ascertainable." 462 U.S. at 800 (emphasis in original). Plaintiff interprets *Mennonite* as creating a standard whereby posted notice, in government action, would be insufficient in all instances where the party in interest's name is readily ascertainable. This Court does not construe *Mennonite* as yielding to plaintiff's interpretation, particularly since both *Mennonite* and *Greene* reaffirmed and applied the principle of *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). There, the Court ruled that notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Id.* at 314; *see also Greene* 456 U.S. at 451 (the sufficiency of notice must be tested with reference to its ability to inform people of the pendency of proceedings that affect their interests). Thus, it is clear that the proper focus in determining the sufficiency of notice is on reasonableness; "whether a particular method of notice is reasonable depends on the particular circumstances." *Tulsa Professional Collection Services, Inc. v. Pope*, ____ U.S. ____, Slip Op. 86-1961 at 6 (Apr. 19, 1988).

The particular circumstances in the instant action merit this Court concluding that the method of posting bulletin notice was reasonable. The *likelihood* of the parties obtaining notice is the crucial factor. In *Mullane*, the Court found it significant that "[c]hance alone [brought] to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper . . . the notice required [did] not even name those whose attention it [was] supposed to attract . . . ." 339 U.S. at 315. Similarly, *Greene* stressed that the notices "were 'not infrequently' removed by children or other tenants before they could have their intended effect." 456 U.S. at 453. The *Mennonite* Court also observed that "publication and posting [were] unlikely to reach those who, although they [had] an interest in the property, do not make special efforts to keep abreast of such notices." 462 U.S. at 799.

The concerns manifest in these three cases are not present in the instant action. However, in analagous situations, *i.e.*, where

an administrative agency is required to give notice in the Federal Register and the regulations do not mandate personal notice, constructive notice has been held sufficient to meet due process requirements. *Kelley v. Secretary, U.S. Dep't of Labor*, 812 F.2d 1378 (Fed. Cir. 1987); *cf. Kentucky v. Brock*, 845 F.2d 117, 122 (6th Cir. 1988) (constructive notice constitutionally sufficient despite Secretary of Labor's failure to notify petitioner of the final action); *Gustafson v. Bd. of Governors*, 717 F.2d 242, 246-47 (5th Cir. 1983), *cert. denied*, 467 U.S. 1242 (1984) (distinguishing *Mullane* as not involving publication in the Federal Register and not concerning administrative proceedings). Even when an administrator assured the interested parties they would be informed of the agency's decision when it was issued, the statute of limitations was not tolled by lack of "courtesy notice," since the law required only published notice in the Federal Register. *Former Employees of Geosearch, Inc. v. United States*, 11 CIT ____, ____, Slip Op. 87-144 at 3-4 (Dec. 30, 1987). Clearly, the bulletin notice is a means which is reasonably calculated to apprise an importer of the liquidation. One who avails himself of the advantages of importing goods into this country can expect liquidation notice to be posted in a specified location, with little probability of it being removed. A reasonably prudent importer is amply apprised of any action taken with respect to his merchandise through the bulletin process and must merely monitor the bulletin to be aware of liquidation. Thus, the Court finds bulletin notice to fall within the minimum constitutional standard since plaintiff is not in the same position as one in which notice is unlikely to reach.

Conclusion

The Court finds that the bulletin notice, as posted, provided sufficient notice to plaintiff of liquidation; notice was given in accordance with customs laws and regulations.

Moreover, importers are presumed to know the customs laws of the United States since they are voluntarily bringing merchandise into the country. Plaintiff does not claim lack of knowledge in regard to the posting procedure. Instead, plaintiff

claims that the notice provided does not satisfy the constitutional minimum since it does not require mailing. An administrative agency, in this case the United States Customs Service, must meet the constitutional standard of apprising interested parties of actions affecting them and does so by providing notice of liquidation pursuant to the Customs regulations. The constitutional standard requires that notice be "reasonably calculated" to reach the parties. Since plaintiff knew the requirements of the law, it was plaintiff's duty to monitor the bulletin notices for references to its entries. The Customs regulations therefore satisfies the minimum constitutional requirement for notice.

/s/ NICHOLAS TSOUCALAS
Nicholas Tsoucalas
Judge

Dated: New York, New York
January 18, 1989

UNITED STATES COURT OF INTERNATIONAL TRADE

BEFORE: JUDGE NICHOLAS TSOUCALAS

Court No. 82-4-00551

GOLDHOFER FAHRZEUGWERK GMBH & CO.,

Plaintiff,

v.

UNITED STATES,

Defendant.

JUDGMENT

This case having been duly submitted for decision, and the Court, after due deliberation, having rendered a decision herein; now, in conformity with said decision, it is hereby

ORDERED, ADJUDGED, and DECREED: that plaintiff's motion for summary judgment is denied, that defendant's motion for summary judgment is granted, and that plaintiff's claim is hereby dismissed.

/s/ NICHOLAS TSOUCALAS
Nicholas Tsoucalas
Judge

Dated: New York, New York
January 18, 1989

Supreme Court, U.S.
FILED
APR 10 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1172

In the Supreme Court of the United States

OCTOBER TERM, 1989

GOLDHOFER FAHRZEUGWERK GMBH & CO., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
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STUART M. GERSON
Assistant Attorney General
MICHAEL JAY SINGER
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QUESTION PRESENTED

Whether the notice regarding the duty that petitioner was required to pay on its imported goods was constitutionally adequate.

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In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1172

GOLDHOFER FAHRZEUGWERK GMBH & CO., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A10) is reported at 885 F.2d 858. The decision of the United States Court of International Trade (Pet. App. A14-A23) is reported at 706 F. Supp. 892.

JURISDICTION

The judgment of the court of appeals (Pet. App. A11) was entered on September 19, 1989. A petition for rehearing was denied on October 20, 1989. Pet. App. A12. The petition for a writ of certiorari was filed on January 17, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The United States Customs Service determines and collects duties on goods imported into this country. A customs officer estimates the value of incoming merchandise by using all reasonable means. See 19 U.S.C. 1500(a); 19 C.F.R. 151.1-151.14. He must then ascertain the rate of duty applicable to such merchandise. 19 U.S.C. 1500(b). After fixing the amount of duty to be paid, the customs officer "liquidates" the entry of the merchandise. 19 U.S.C. 1500(c) and (d).[1] He must give notice of the liquidation to the importer, its consignee, or agent in accordance with the regulations prescribed by the Secretary of the Treasury. 19 U.S.C. 1500(e).

The Secretary's regulations require that notice of liquidation be made on a "bulletin notice of liquidation" – Customs Form 4333 or 4335. 19 C.F.R. 159.9(a). That bulletin is to be posted for the information of importers in a conspicuous place in the customhouse at the port of entry. 19 C.F.R. 159.9(b). The entries covered by the bulletin notice are stamped "Liquidated," which is deemed to be the legal evidence of liquidation. 19 C.F.R. 159.9(c). The regulations also provide that the Customs Service will endeavor to provide importers or their agents with Customs Form 4333-A, which is called a "Courtesy Notice." That notice "shall serve as an informal, courtesy notice and not as a direct, formal and decisive notice of liquidation." 19 C.F.R. 159.9(d).

The liquidation decision of the Customs Service is final unless a protest is filed with the appropriate Customs officer within 90 days after the notice of liquidation. 19 U.S.C.

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[1] "Liquidation" is defined as "the final computation or ascertainment of the duties or drawback accruing on an entry." 19 C.F.R. 159.1. With certain exceptions not here applicable, all imported goods must be liquidated. 19 C.F.R. 159.2.

1514(c)(2).[2] If the protest is denied, the party may contest the denial by bringing a civil action in the Court of International Trade. 28 U.S.C. 1581(a).

2. Petitioner is a corporation organized under the laws of the Federal Republic of Germany. Pet. App. A3. Petitioner imported a multi-axle "gooseneck" semitrailer, Entry No. 101757, on February 16, 1980, at the Port of Norfolk, Virginia. *Ibid.* An error by the Customs Service caused the name of an unrelated third party, Walsen Design and Manufacturing, to be included on the computer printout sheet that was to be posted in the customhouse on June 5, 1981. *Ibid.* Before posting the "bulletin notice of liquidation," however, a clerk manually corrected the error by writing in petitioner's name and address. *Ibid.* The courtesy notice and the bill, however, were sent to the party originally listed on the printout. As a result, petitioner never received a courtesy notice of the liquidation or an original bill. *Ibid.*

The Customs Service prepared a "REBILL" on September 4, 1981 – the 91st day after the June 5, 1981, liquidation – and addressed it to petitioner in West Germany. Pet. App. A4. Petitioner filed a protest on December 1, 1981. *Ibid.* The Customs Service received the protest 179 days after the bulletin notice of liquidation. Accordingly, the Customs Service denied the protest as untimely because it was not filed within the 90-day protest period set forth in 19 U.S.C. 1514(c)(2). *Ibid.*

3. Petitioner then filed this suit in the United States Court of International Trade. Petitioner argued that it had not received proper "bulletin" notice as required by 19 U.S.C. 1500(e). It also claimed that the Customs Service's

[2] Protests may be brought by: (1) the importers or consignees shown on the entry papers, or their sureties, (2) any person paying any charge or exaction, (3) any person seeking entry or delivery, (4) any person filing a claim for drawback, or (5) any authorized agent of any of the above-described persons. 19 U.S.C. 1514(c).

failure to send a courtesy notice was a violation of the Due Process Clause. Pet. App. A4.

The trial court granted the government's motion for summary judgment. The court recognized that notice is inadequate if "the importer could * * * have reasonably been misled or confused by the bulletin notice of liquidation, as posted." Pet. App. A17. But the court stated that it could not "envision how [petitioner] could have been misled by this notice." *Ibid.* The court noted that: (1) petitioner's name was legible and easily seen, (2) petitioner's name was clearly intended to replace the crossed-out name, and (3) petitioner's name appeared in its proper alphabetical sequence, next to the correct entry number as well as the correct date of entry. The trial court held: "A prudent importer would have concluded that it was his entry which was posted. At the least, [petitioner] should have inquired into the nature of the correction." *Ibid.*

The trial court also ruled that the Customs Service was not constitutionally required to send a courtesy notice by mail. It noted that "[t]he only notice that is statutorily mandated is bulletin notice 'in a conspicuous place in the customhouse at the port of entry.' " Pet. App. A19. It further held that "[t]he agency has no duty 'to enlarge or broaden the mandatory requirement of the law' * * * merely because the importer has become accustomed to an extended courtesy." *Ibid.* The trial court rejected petitioner's contention that this Court's decision in *Mennonite Bd. of Missions* v. *Adams*, 462 U.S. 791 (1983), means that posted notice is always constitutionally inadequate where the name of the interested party is known. Relying on *Tulsa Professional Collection Servs., Inc.* v. *Pope*, 485 U.S. 478 (1988), the trial court held that "the proper focus in determining the sufficiency of notice is on reasonableness; 'whether a particular method of notice is reasonable depends on the par-

ticular circumstances.' " Pet. App. A21. The trial court concluded that

> [c]learly, the bulletin notice is a means which is reasonably calculated to apprise an importer of the liquidation. One who avails himself of the advantages of importing goods into this country can expect liquidation notice to be posted in a specified location, with little probability of it being removed. A reasonably prudent importer is amply apprised of any action taken with respect to his merchandise through the bulletin process and must merely monitor the bulletin to be aware of liquidation.

Id. at A22.

4. The court of appeals affirmed. The court agreed with the trial court that the Customs Service's "posting 'bulletin notice' of liquidation alone both complies with the applicable customs laws and regulations and satisfies the minimum constitutional standards for due process." Pet. App. A2. The court of appeals observed that this Court's decision in *Mennonite Bd. of Missions* means that the Customs Service must provide notice that is as likely as notice by mail "to ensure actual notice." *Id.* at A7. The court then considered several factors to determine whether the notice in this case met that standard—*i.e.*, (1) whether the notice relied on chance alone to reach the interested party, (2) whether the notice was designed to attract the attention of the interested party, (3) whether the means of providing notice was reliable, and (4) whether there were any "feasible and customary" alternatives to the form of notice chosen. *Id.* at A7-A9.

The court of appeals concluded that the Custom Service's "posting of bulletin notice of liquidation in the customhouse at the port of entry alone was as certain to ensure actual notice of liquidation to the importer of record or its local

Customs broker as mail notice." Pet. App. A9-A10. The court reasoned that "[petitioner], by choosing to enter its goods at a particular port of entry, knew that liquidation would occur there and selected that precise location to receive the notice of that liquidation." *Id.* at A7. Moreover, the court of appeals found that the notice was designed to attract the attention of the interested party because it listed "the name of the importer of record, the date of entry, the liquidation date, the region/district/port number, the action, and the type of entry and number." *Id.* at A8. In addition, the court observed that there was no evidence that bulletin notice was unreliable. *Id.* at A9.

ARGUMENT

Petitioner maintains (Pet. 7-9) that notice by mail is constitutionally required in all cases where the intended recipient's name and address are ascertainable.[3] Petitioner is mistaken; this Court's decisions do not impose such an inflexible requirement.

It is well settled that "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). "The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." *Id.* at 315. Under *Mullane*, the determination whether a particular type of notice is constitutionally adequate requires

[3] In its section entitled "Questions Presented for Review" (Pet. i), petitioner also sets forth an equal protection issue. Petitioner, however, does not discuss that question in the text.

balancing the interest of the government in finality and the individual's interest in actual notice. *Id.* at 314.

Petitioner erroneously contends (Pet. 8) that the Court in *Mennonite Bd. of Missions* rejected the *Mullane* approach and adopted a per se rule requiring notice by mail in all cases. In fact, the Court in *Mennonite Bd. of Missions* stated that the "case [was] controlled by the analysis in *Mullane*." 462 U.S. at 798. And although the Court in *Mennonite Bd. of Missions* required notice by mail in that case, it did not create a per se rule that such notice is constitutionally required in all cases. On the contrary, the Court approved "[n]otice by mail *or other means* as certain to ensure actual notice." 462 U.S. at 800 (emphasis added). Thus, the Due Process Clause continues to mean that the courts must look to the circumstance of a particular case to determine the adequacy of notice. See, *e.g.*, *Tulsa Professional Collection Servs.* v. *Pope*, 485 U.S. 478 (1988).

In this case, the court of appeals followed the Court's command in *Mennonite Bd. of Missions* that the notice given petitioner be as reliable as notice by mail. See Pet. App. 7, 9-10. And petitioner does not challenge the court of appeals' critical conclusion that the notice in this case was as likely as notice by mail to result in actual notice.[4] Thus, no further review is warranted.[5]

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[4] The court of appeals reasonably found that petitioner's own lack of care resulted in the absence of actual notice in this case. Petitioner knew where the notice would be posted; it simply chose not to monitor the liquidation notices even though "[t]he need to monitor the bulletin posting has been repeatedly emphasized." Pet. App. A19.

[5] The appellate court cases that petitioner cites (Pet. 9) did not involve situations where the notice given was as likely as mail notice to result in actual notice. Thus, they do not conflict with the holding in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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